

1 **UNITED STATES DISTRICT COURT**

2 **DISTRICT OF NEVADA**

3 RODERICK R. DAVIDSON,

Case No. 2:14-cv-00551-APG-NJK

4 Petitioner,

**ORDER DENYING PETITION**

5 v.

6 JERRY HOWELL, *et al.*,

7 Respondents.

8 **INTRODUCTION**

9 Roderick Davidson, a Nevada prisoner, filed a petition for writ of habeas corpus under 28  
10 U.S.C. § 2254. I will deny Davidson's habeas petition, deny him a certificate of appealability,  
11 and direct the Clerk of the Court to enter judgment accordingly.

12 **BACKGROUND**

13 Davidson's convictions are the result of events that occurred in Clark County, Nevada on  
14 June 28 and 30, 2004. *See* Ex. 38, ECF No. 11-11. On June 28, 2004, Davidson went to the  
15 home of Robert Garvin, a neighbor of Davidson's parents. Ex. 27, ECF No. 11 at 14. Davidson  
16 knocked on Garvin's door, and when Garvin let him inside, Davidson battered Garvin and stole  
17 money and Garvin's vehicle. *Id.* at 15, 19. On June 30, 2004, Davidson was walking through a  
18 church parking lot when he came across a maintenance worker, Rulon Spencer. Ex. 27, ECF No.  
19 11 at 80, 82. Davidson approached Spencer while he was in a church closet and asked him about  
20 employment. *Id.* at 85, 88. Davidson then battered Spencer and stole his wallet and vehicle. *Id.*  
21 at 89, 93.

22 Davidson was convicted by a state court jury of two counts of burglary, two counts of  
23 battery with substantial bodily harm, one count of robbery of a victim 60 years of age or older,

1 and one count of robbery without any aggravating element. Ex. 38, ECF No. 11-11. Davidson  
2 appealed. Ex. 39, ECF No. 11-12. The Supreme Court of Nevada affirmed in part and reversed  
3 in part, holding that one of the counts of robbery was a double-jeopardy violation and one of the  
4 counts of battery was a misdemeanor, not a felony, so Davidson was wrongly sentenced as a  
5 habitual criminal for that count. Ex. 44, ECF No. 12-3. Davidson petitioned for rehearing. Ex.  
6 45, ECF No. 12-4. The Supreme Court of Nevada denied that petition. Ex. 46, ECF No. 12-5.  
7 On December 23, 2008, the state district court entered an amended judgment of conviction in  
8 accordance with the Supreme Court of Nevada's decision. Ex. 47, ECF No. 12-6. The Supreme  
9 Court of Nevada issued its remittitur on January 13, 2009. Ex. 49, ECF No. 12-8. Davidson's  
10 petition for en banc reconsideration was denied on January 20, 2009. Ex. 48, ECF No. 12-7; Ex.  
11 50, ECF No. 12-9.

12 Davidson filed a post-conviction habeas corpus petition on October 16, 2009, which the  
13 state district court denied. Ex. 51, ECF No. 12-10; Ex. 57, ECF No. 12-16. Davidson appealed,  
14 and the Supreme Court of Nevada affirmed. Ex. 62, ECF No. 13-1. The remittitur issued on  
15 January 7, 2013. Ex. 63, ECF No. 13-2.

16 Davidson then filed two other motions in state district court. First, he moved for  
17 modification of sentence on April 15, 2013. Ex. 64, ECF No. 13-3. The court denied that motion  
18 on May 22, 2013. Ex. 68, ECF No. 13-7. Davidson did not appeal the denial of that motion.  
19 However, on June 10, 2013, while the time to appeal was still running, he filed a motion to  
20 correct an illegal sentence, which the state district court denied. Ex. 69, ECF No. 13-8; Ex. 72,  
21 ECF No. 13-11. Davidson appealed, and the Supreme Court of Nevada affirmed. Ex. 73, ECF  
22 No. 13-12. The remittitur issued on February 11, 2014. Ex. 74, ECF No. 13-13.

Davidson commenced this action by mailing his proper-person petition to this court on March 21, 2014. ECF No. 1. I appointed counsel, who filed an amended petition. ECF No. 9.

Davidson's amended petition asserts the following grounds for relief:

1. The state district court improperly admitted inmate request/grievance forms into evidence.
2. Davidson was required to fill out inmate/request grievance forms, which were then used against him at trial.
3. The state district court improperly admitted unreliable, tainted, and unduly suggestive identifications.
4. The state district court improperly admitted Davidson's unreliable and involuntary confession.
5. The state district court improperly refused to sever the two cases.
6. There were cumulative errors at Davidson's trial.
7. Davidson's trial was not speedy.
8. Davidson's trial counsel was ineffective by:
  - a. failing to object to the admission of the inmate request/grievance forms;
  - b. failing to object to the flight instruction;
  - c. failing to object to prosecutorial misconduct;
  - d. failing to object to the reasonable doubt instruction; and
  - e. cumulative errors committed by Davidson's trial counsel.
9. Davidson's appellate counsel was ineffective by:
  - a. failing to include a ground in his direct appeal concerning the flight instruction;
  - b. failing to include a ground in his direct appeal concerning prosecutorial misconduct;
  - c. failing to include a ground in his direct appeal concerning the reasonable doubt instruction; and

1 d. cumulative errors committed by Davidson’s appellate counsel.

2 *Id.* The Respondents filed a motion to dismiss. ECF No. 20. On August 9, 2016, I granted the  
3 Respondents’ motion to dismiss in part, finding Ground 6 to be unexhausted. ECF No. 34.  
4 Davidson moved for partial dismissal of Ground 6 from the amended petition, which I granted.  
5 ECF Nos. 35, 37. The Respondents filed an answer to the amended petition on February 13,  
6 2017. ECF. No. 44. Davidson filed a reply on June 26, 2017. ECF No. 49.

## 7 **DISCUSSION**

### 8 **Standard of Review**

9 28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in habeas  
10 corpus cases under the Antiterrorism and Effective Death Penalty Act (“AEDPA”):

11 An application for a writ of habeas corpus on behalf of a person in custody  
12 pursuant to the judgment of a State court shall not be granted with respect to any  
13 claim that was adjudicated on the merits in State court proceedings unless the  
14 adjudication of the claim --

15 (1) resulted in a decision that was contrary to, or involved an unreasonable  
16 application of, clearly established Federal law, as determined by the  
17 Supreme Court of the United States; or

18 (2) resulted in a decision that was based on an unreasonable determination of  
19 the facts in light of the evidence presented in the State court proceeding.

20 A state court decision is contrary to clearly established Supreme Court precedent, within the  
21 meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing  
22 law set forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that  
23 are materially indistinguishable from a decision of [the Supreme] Court.” *Lockyer v. Andrade*,  
538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing  
*Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court decision is an unreasonable application  
of clearly established Supreme Court precedent within the meaning of 28 U.S.C. § 2254(d) “if

1 the state court identifies the correct governing legal principle from [the Supreme] Court’s  
2 decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 75  
3 (quoting *Williams*, 529 U.S. at 413). “The ‘unreasonable application’ clause requires the state  
4 court decision to be more than incorrect or erroneous. The state court’s application of clearly  
5 established law must be objectively unreasonable.” *Id.* (quoting *Williams*, 529 U.S. at 409-10)  
6 (internal citation omitted).

7 “A state court’s determination that a claim lacks merit precludes federal habeas relief so  
8 long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.”  
9 *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652,  
10 664 (2004)). But “even a strong case for relief does not mean the state court’s contrary  
11 conclusion was unreasonable.” *Id.* at 102 (citing *Lockyer*, 538 U.S. at 75); *see also Cullen v.*  
12 *Pinholster*, 563 U.S. 170, 181 (2011) (describing the standard as a “difficult to meet” and  
13 “highly deferential standard for evaluating state-court rulings, which demands that state-court  
14 decisions be given the benefit of the doubt” (internal quotation marks and citations omitted)).

15 Section 2254(d) generally applies to unexplained as well as reasoned state-court  
16 decisions. “When a federal claim has been presented to a state court and the state court has  
17 denied relief, it may be presumed that the state court adjudicated the claim on the merits in the  
18 absence of any indication or state-law procedural principles to the contrary.” *Harrington*, 562  
19 U.S. at 99. When the state court has denied a federal constitutional claim on the merits without  
20 explanation, the federal habeas court

21 must determine what arguments or theories supported or . . . could have  
22 supported, the state court’s decision; and then it must ask whether it is possible  
23 fairminded jurists could disagree that those arguments or theories are inconsistent  
with the holding in a prior decision of [the United States Supreme] Court.

1 *Id.* at 102.

2 **Ground 1**

3 In Ground 1, Davidson claims that his federal constitutional rights were violated when  
4 the state district court admitted his inmate request/grievance forms into evidence. ECF No. 9 at  
5 12. Davidson contends the admission of the forms prejudiced him, rendered the trial  
6 fundamentally unfair, and undermined the presumption of innocence. *Id.* at 13. He asserts that  
7 the forms should have been redacted, or the court should have at least given a limiting  
8 instruction. *Id.* The Respondents argue that the evidence was admitted only as a handwriting  
9 analysis, the substance of the forms was not discussed during trial, and the State had to revert to  
10 the use of the forms because Davidson refused to comply with the handwriting expert in  
11 providing samples. ECF No. 44 at 8.

12 This ground was raised in Davidson’s direct appeal. Ex. 40, ECF No. 11-13 at 31. The  
13 Supreme Court of Nevada held that “the district court did not plainly err in admitting Davidson’s  
14 inmate request/grievance forms.” Ex. 44, ECF No. 12-3 at 4 n.1. As this ground was denied on  
15 the merits by the Supreme Court of Nevada without analysis, the question here is whether  
16 Davidson has shown that there was no reasonable basis for that ruling. *See Harrington*, 562 U.S.  
17 at 98.

18 Robert Garvin, one of the victims, testified that Davidson’s mother, Gwendolyn  
19 Davidson, provided him with an apology letter written by Davidson. Ex. 27, ECF No. 11 at 13,  
20 36-37; *see* Ex. 79, ECF No. 13-18. Rulon Spencer, the other victim, testified that he, too,  
21 received a letter from Davidson. Ex. 27, ECF No. 11 at 80, 101-104; *see* Ex. 80, ECF No. 13-19.  
22 Gwendolyn Davidson testified that Davidson gave the two apology letters to a good friend and  
23 that Gwendolyn later delivered those letters to the victims. Ex. 29, ECF No. 11-2 at 63, 70.

1 On February 10, 2005, the state district court granted the State's motion to compel a  
2 handwriting sample in order to compare Davidson's handwriting to the apology letters. Ex. 12,  
3 ECF No. 10-12. The state district court ordered Davidson "to give to representatives of the Las  
4 Vegas Metropolitan Police Department and/or the Clark County Detention Center's nursing staff  
5 samples of his handwriting" and that those thereafter be submitted "to the Crime Lab of the Las  
6 Vegas Metropolitan Police Department" for analysis. *Id.* Jan Seaman Kelly, a forensic document  
7 examiner, testified that she attempted to receive a writing exemplar from Davidson. Ex. 29, ECF  
8 No.11-2 at 24, 33. Kelly testified that Davidson was slow to start the handwriting sample  
9 process and that when he did start the sample, "the writing was very slow." *Id.* at 34. Kelly  
10 testified that Davidson's writing exemplar was not adequate, as it was not "considered natural  
11 writing" due to the time that Davidson "kept looking at the floor" and writing slowly. *Id.* at 34,  
12 37. Kelly terminated the exemplar and requested a business writing. *Id.* at 37. Davidson's  
13 inmate request/grievance forms were provided to Kelly, and she "identified Roderick Davidson  
14 as the writer of both of the questioned letters." *Id.* at 37, 44.

15 Beverly Amin, an arrest supervisor at the jail who maintains inmate records, testified  
16 about inmate request/grievance forms, which are "call[ed] kites for short." Ex. 29, ECF No.11-2  
17 at 11-13. Amin testified that

18 [i]f an inmate has a request, they want something or a grievance or are upset about  
19 something, they have to fill out one of these forms and it's passed on to the person  
20 or persons who take care of it for them. And they answer – and the answer is  
21 given back to them on that same form.

21 *Id.* at 13. Davidson's inmate request/grievance forms were admitted into evidence without  
22 objection. *Id.* at 14.

Davidson's inmate request/grievance forms ranged from July 8, 2004 through April 10, 2005. Ex. 81, ECF No. 13-20. In those forms, it is apparent that Davidson wished to attend the following programs: narcotics anonymous, domestic violence, successful release, chemical dependency, anger management, and alcoholics anonymous. *Id.* at 3-6, 9-29, 31-50, 53. The inmate request/grievance forms also show that there was a fight in the jail in which Davidson had to be subdued, that Davidson's request to be transferred to a different tower was denied because he was not "write up free for 6 months," and that Davidson had never been incarcerated in Nevada before, implying that he had been incarcerated elsewhere. *Id.* at 8, 30, 51.

"A habeas petitioner bears a heavy burden in showing a due process violation based on an evidentiary decision." *Boyde v. Brown*, 404 F.3d 1159, 1172 (9th Cir. 2005), *as amended on reh'g*, 421 F.3d 1154 (9th Cir. 2005). "[C]laims deal[ing] with admission of evidence" are "issue[s] of state law." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009); *see also Lewis v. Jeffers*, 497 U.S. 764 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law."). Therefore, the issue before me is "whether the state proceedings satisfied due process." *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991). In order for the admission of evidence to provide a basis for habeas relief, the evidence must have "rendered the trial fundamentally unfair in violation of due process." *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995) (citing *Estelle v. McGuire*, 502 U.S. 62, 67 (1991)). Not only must there be "no permissible inference the jury may draw from the evidence," but also the evidence must "be of such quality as necessarily prevents a fair trial." *Jammal*, 926 F.2d at 920 (emphasis in original) (citation omitted).

Further, "[u]nder AEDPA, even clearly erroneous admissions of evidence that render a trial fundamentally unfair may not permit the grant of federal habeas corpus relief if not



1 forbidden by ‘clearly established Federal law,’ as laid out by the Supreme Court.” *Yarborough*,  
2 568 F.3d at 1101 (citing 28 U.S.C. § 2254(d)); *see also Dowling v. United States*, 493 U.S. 342,  
3 352 (1990) (explaining that the Supreme Court has “defined the category of infractions that  
4 violate ‘fundamental fairness’ very narrowly”). Importantly, the Supreme Court “has not yet  
5 made a ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due  
6 process violation sufficient to warrant issuance of the writ.” *Id.* The Supreme Court has also  
7 declined to hold that evidence of other crimes or bad acts “so infused the trial with unfairness as  
8 to deny due process of law.” *Estelle*, 502 U.S. 62, 75 n.5 (1991); *see also Alberni v. McDaniel*,  
9 458 F.3d 860 (9th Cir. 2006).

10 Although the inmate request/grievance forms included information that might indicate  
11 Davidson may have had issues with addiction and violence, the forms were admitted for a  
12 permissible purpose: showing the basis of the handwriting analysis expert’s opinion that  
13 Davidson wrote the two apology letters. *See Jammal*, 926 F.2d at 920. And Davidson has not  
14 established that this evidence is impermissible in a constitutional sense. Regardless of whether  
15 the evidence had a constitutionally permissible purpose, the admission of the forms was not “of  
16 such quality as necessarily prevent[ed] a fair trial.” *Jammal*, 926 F.2d at 920. Accordingly, the  
17 Supreme Court of Nevada’s ruling was not contrary to, or an unreasonable application of, clearly  
18 established federal law as determined by the Supreme Court, and was not based on an  
19 unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d). I will  
20 deny Davidson habeas corpus relief with respect to Ground 1.

## 21 **Ground 2**

22 In Ground 2, Davidson claims that his federal constitutional rights were violated when he  
23 was required to fill out the inmate request/grievance forms, which the State then used as

1 evidence against him. ECF No. 9 at 14. Davidson explains that he was never advised that the  
2 statements in the forms could be used against him or that he had the right to consult an attorney  
3 before communicating with state officials using the forms. *Id.* at 15. Davidson reasons that the  
4 lack of notice on the form suggests to the inmate that the form will remain a confidential internal  
5 document. ECF No. 49 at 14. The Respondents argue that Davidson has failed to establish that  
6 the forms had a substantial and injurious effect on the verdict. ECF No. 44 at 9.

7         This ground was raised in Davidson’s direct appeal. Ex. 40, ECF No. 11-13 at 34. The  
8 Supreme Court of Nevada held that “the admission [of Davidson’s inmate request/grievance  
9 forms] did not violate Davidson’s Sixth Amendment right to counsel.” Ex. 44, ECF No. 12-3 at 4  
10 n.1. As this ground was denied on the merits by the Supreme Court of Nevada without analysis,  
11 the question here is whether Davidson has shown that there was no reasonable basis for the  
12 Supreme Court of Nevada’s ruling. *See Harrington*, 562 U.S. at 98.

13         Although the Supreme Court of Nevada addressed this ground only in regards to  
14 Davidson’s Sixth Amendment right to counsel, Davidson also argues that his Fifth Amendment  
15 protection against self-incrimination was also violated. *See* ECF No. 14; Ex. 40, ECF No. 11-13  
16 at 34. The Respondents rely on precedent that “[t]he taking of [handwriting] exemplars d[oes]  
17 not violate [a] petitioner’s Fifth Amendment privilege against self-incrimination.” *Gilbert v.*  
18 *California*, 388 U.S. 263, 266 (1967). But Davidson’s inmate request/grievance forms were used  
19 for handwriting comparison purposes, rather than a handwriting exemplar, so *Gilbert* is not  
20 directly applicable.

21         The privilege against self-incrimination “protects an accused only from being compelled  
22 to testify against himself, or otherwise provide the State with evidence of a testimonial or  
23 communicative nature.” *Schmerber v. California*, 384 U.S. 757, 761 (1966). “[T]he protection

1 of the privilege reaches an accused's communications, whatever form they might take, and the  
2 compulsion of responses which are also communications, for example, compliance with a  
3 subpoena to produce one's papers." *Id.* at 763-64. The distinction between what is considered  
4 privileged and what is not considered privileged "is that the privilege is a bar against compelling  
5 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the  
6 source of 'real or physical evidence' does not violate it." *Id.* at 764; *see also United States v.*  
7 *Euge*, 444 U.S. 707, 718 (1980) ("The compulsion of handwriting exemplars has been the  
8 subject of far less protection than the compulsion of *testimony and documents*." (emphasis  
9 added)); *Gilbert*, 388 U.S. at 266-67 ("A mere handwriting exemplar, *in contrast to the content*  
10 *of what is written*, like the voice or body itself, is an identifying physical characteristic outside  
11 [the Fifth Amendment's] protection." (emphasis added)). Therefore, the issue at hand is whether  
12 the inmate request/grievance forms was merely used for the "real or physical" handwriting  
13 contained within them or whether they were used as communications by Davidson.

14         The Supreme Court has explained that "compelling [a defendant] to speak within hearing  
15 distance of the witnesses, even to utter words purportedly uttered by the robber, was not  
16 compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an  
17 identifying physical characteristic, not to speak his guilt." *United States v. Wade*, 388 U.S. 218,  
18 222-23 (1967) (explaining that the privilege against self-incrimination turns on the "compulsion  
19 of the accused to give evidence having testimonial significance," in other words, "compulsion to  
20 disclose any knowledge he might have"). Similarly, the inmate request/grievance forms were  
21 used to identify a physical characteristic—Davidson's handwriting—not to demonstrate his guilt.  
22 In fact, the forms discuss only Davidson's wishes to attend classes for addiction and violence,  
23 the fact that there was a fight in the jail, and that Davidson was ineligible for a transfer. *See Ex.*

1 81, ECF No. 13-20. The forms do not discuss the facts of the crimes and especially do not  
2 discuss Davidson's guilt thereof. Further, when the State introduced the forms and offered them  
3 into evidence, the State and the State's witnesses did not touch upon the contents of the forms;  
4 rather, they discussed only the handwriting on the forms. *See* Ex. 29, ECF No. 11-2 at 11-14, 37-  
5 49; *see also Wade*, 388 U.S. at 223 ("[T]his case presents no question of the admissibility in  
6 evidence of anything [the defendant] said or did at the lineup which implicates his privilege. The  
7 Government offered no such evidence as part of its case, and what came out about the lineup  
8 proceedings on [the defendant's] cross-examination . . . involved no violation of [the  
9 defendant's] privilege.").

10 Because the inmate request/grievance forms were admitted only to identify Davidson's  
11 handwriting, I cannot find that Davidson's Fifth Amendment privilege against self-incrimination  
12 was violated. And because the State did not elicit any incriminating statements from Davidson,  
13 Davidson's Sixth Amendment right to counsel was also not violated. *See Massiah v. United*  
14 *States*, 377 U.S. 201, 206 (1964); *Randolph v. California*, 380 F.3d 1133, 1143 (2004).

15 Therefore, the Supreme Court of Nevada's ruling was not contrary to, or an unreasonable  
16 application of, clearly established federal law as determined by the Supreme Court of the United  
17 States, and was not based on an unreasonable determination of the facts in light of the evidence.

18 *See* 28 U.S.C. § 2254(d). I will deny Davidson habeas corpus relief with respect to Ground 2.

19 **Ground 3**

20 In Ground 3, Davidson claims that his federal constitutional rights were violated when  
21 the state district court admitted unreliable, tainted, and unduly suggestive identifications. ECF  
22 No. 9 at 16. Davidson explains that neither Garvin nor Spencer had ample opportunity to view  
23 the assailant at the time of the crime, demonstrated a high level of detailed accuracy in their

1 initial descriptions of the assailant, and successfully identified Davidson as the assailant during  
2 initial photographic lineups. ECF No. 49 at 23. Davidson also explains that the victim's later  
3 identifications were tainted by their receipt of apology letters. ECF No. 9 at 16. The  
4 Respondents argue that Davidson had every opportunity to cross-examine both victims about the  
5 issues of mistaken identity. ECF No. 44 at 10.

6 This ground was raised in Davidson's direct appeal. Ex. 40, ECF No. 11-13 at 37. The  
7 Supreme Court of Nevada held that "the identification procedures were not suggestive or unduly  
8 tainted." Ex. 44, ECF No. 12-3 at 4 n.1. As this ground was denied on the merits by the Supreme  
9 Court of Nevada without analysis, the question here is whether Davidson has shown that there  
10 was no reasonable basis for that ruling. *See Harrington*, 562 U.S. at 98.

11 Garvin was given a photo lineup following the attack. *See* Ex. 76, ECF No. 13-15.  
12 Garvin indicated the following:

13 I am unable to identify any of the pictures right now – I only got a brief look  
14 when he knocked. He said his name was Anthony[;] called me by name [and]  
15 made a pretext of getting in touch with his parents who I know very well. I  
believed that he was the son of my two friends across the street (neighbors)  
Gywnn [sic] [and] Elbert.

16 After looking at the photos again, I recognize #2 as the man who assaulted me –  
17 he had a blue [and] white sports jersey on.

18 *Id.* at 3.

19 Garvin later testified at the preliminary hearing that he "heard a knock at the door" and  
20 "saw [his] neighbor's son." Ex. 3, ECF No. 10-3 at 4-5. Garvin did not know Davidson's name  
21 at that time and could not remember what name the assailant gave him before the attack began.  
22 *Id.* at 6, 8. Garvin had never been formally introduced to Davidson, but he "had spoken to him  
23

1 from like across the street a couple of times” for “[a] few minutes.” *Id.* at 6-7. Garvin identified  
2 Davidson during the preliminary hearing as the person who battered him. *Id.* at 5.

3 Garvin testified at Davidson’s trial that he was at home watching television when he  
4 heard a knock on his door. Ex. 27, ECF No. 11 at 14. The individual at his door had a medium  
5 build, dark brown skin, and was in his mid-thirties. *Id.* at 27. Garvin recognized the individual as  
6 being his neighbor’s son. *Id.* He testified that he could not recall his name and that he had never  
7 been formally introduced to him although he had had minor interactions with him. *Id.* at 16-17,  
8 28. After Garvin opened his door, the individual “hit [Garvin] with both arms extended and  
9 knocked [Garvin] back against the door, and then after that he got [him] in a headlock and  
10 dragged [Garvin] around the house looking for the money and car keys.” *Id.* at 18. The  
11 individual then took Garvin’s money and his car. *Id.* at 19. Garvin identified Davidson during  
12 the trial as being the assailant. *Id.* at 29.

13 Garvin had no recollection of anything that happened after the attack until the EMTs  
14 arrived. *Id.* at 30-31. In fact, he did not remember making a 911 call. *Id.* at 30. Garvin was  
15 shown a photo lineup and was unable to pick out the assailant right away because he “was a little  
16 fuzzy” and “just got to look at [the assailant], you know, for a fleeting second really.” *Id.* at 34-  
17 36. When asked why he was so sure that Davidson was the individual who attacked him, Garvin  
18 testified “[h]e sent me a letter of apology a few days later. His mom brought it over to me.” *Id.*  
19 at 36. Garvin later clarified that the letter was how he “knew definitely it was [Davidson].” *Id.* at  
20 46. Garvin was then asked about his 911 call:

21 Q Mr. Garvin, is it fair to say that when you called the 9-1-1 operator you  
22 couldn’t identify who this person was?

23 A Well I think that I can’t remember what happened after I came to. I  
remember opening the door for him and remember who I saw standing  
there; and that’s the reason I let him in because it was my neighbor’s son.

1 Q At the time that you were talking to 9-1-1, I know that you had just been  
2 attacked. By the time you were talking to them you were unable to  
3 identify who it was.

4 A Yeah.

5 *Id.* at 42. Garvin was then asked about his statement to the police:

6 Q Okay; and during your voluntary statement to the police at the hospital  
7 later that day, they asked you: Would you recognize this person if you saw  
him again? Right?

8 A Yeah.

9 Q And your answer to them was: It's hard to say; maybe.

10 A Yeah. Yeah.

11 Q Okay; and you said to them you're not really sure what the fellow across  
12 the street looks like.

13 A Well, more or less.

14 Q Okay; and that you've never really seen him up close.

15 A No.

16 Q Okay; and actually you believe that a young fellow – your own words –  
there's a young fellow that I think has been staying across the street.

17 A Yeah.

18 Q Okay; and when they asked you about any interaction you may have had  
19 with that young fellow, you said that you had one conversation with him  
from across the way.

20 A Yeah. Yeah, and we'd say hi back and forth when I'd see him, you know.

21 Q Okay, but there wasn't any great interaction with you and Roderick  
22 Davidson?

23 A No.

1 Q Then you were given a photo lineup the day after, while you were in the  
2 hospital. Do you remember that?

3 A Right.

4 Q And at the time, your first – your initial statement to the police was that  
5 you were unable to identify any of the people in the pictures.

6 A Yes.

7 Q And that you only got a brief look at the person when he knocked on the  
8 door?

9 A Well the pictures weren't that good. That's what was giving me a little bit  
10 of a problem. It was hard to distinguish.

11 *Id.* at 42-44.

12 Turning to Spencer, he testified that he saw a black male between the ages of 25 and 30  
13 who was about six feet tall walking in the parking lot of the church. Ex. 27, ECF No. 11 at 80,  
14 82-83. Spencer was in a "little closet on the northwest corner of the building" when "the  
15 individual walked up and stepped inside the door, and . . . asked [him] for a job." *Id.* at 85, 88.  
16 Spencer responded that he did not have a job for him, and "[a]t that point he turned around, took  
17 one step away from [Spencer] like if he's going to leave and then he swung around real quick  
18 and with his right first he punched [Spencer] in the face." *Id.* at 89. The punch knocked Spencer  
19 down, and then the individual "c[a]me on top of [Spencer] and started beating [Spencer] with his  
20 right fist." *Id.* at 90. The individual took Spencer's wallet, left the closet, and took Spencer's  
21 truck. *Id.* at 93. At the trial, Spencer identified Davidson as the individual who battered him. *Id.*  
22 at 99-100. Prior to the preliminary hearing, Spencer received a letter, which he gave to a  
23 prosecutor. *Id.* at 101-03. The prosecutor opened the letter and indicated that it "was a letter  
from the individual that assaulted [Spencer]." *Id.*



1 Spencer testified that, while he was still in the hospital, he had been given a photo lineup  
2 following the attack. *Id.* at 111-113. He testified that he “wasn’t sure” whether the assailant was  
3 one of the people in the lineup. *Id.* at 111. He picked out the person in the fifth spot, who was  
4 “Brown, Wade DeYoung.” *Id.* at 111, 113. Spencer testified that he had previously picked out  
5 Davidson at the preliminary hearing “[b]ecause [he] recognized his features. [He] recognized  
6 that that was the individual that had actually attacked [him].” *Id.* at 113-14; *see also* Ex. 3, ECF  
7 No. 10-3 at 8, 10 (identification by Spencer of Davidson as the assailant at the preliminary  
8 hearing). Spencer clarified that “[t]here’s something about his physical facial feature that struck  
9 [him] real strong and [he] knew with no doubt that that was him.” Ex. 27, ECF No. 11 at 114.  
10 Spencer testified that he was one hundred percent sure that Davidson is the man that battered  
11 him. *Id.*

12 “To constitute a due process violation, the photographic identification procedure must be  
13 so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable  
14 misidentification.” *Denham v. Deeds*, 954 F.2d 1501, 1504 (9th Cir. 1992); *see also Simmons v.*  
15 *United States*, 390 U.S. 377, 384 (1968) (holding that “convictions based on eyewitness  
16 identification at trial following a pretrial identification by photograph will be set aside on that  
17 ground only if the photographic identification procedure was so impermissibly suggestive as to  
18 give rise to a very substantial likelihood of irreparable misidentification”). Determining whether  
19 a pretrial identification procedure violates a suspect’s due-process rights is a two-step inquiry.  
20 *United States v. Love*, 746 F.2d 477, 478 (9th Cir. 1984). “First, it must be determined whether  
21 the procedures used were impermissibly suggestive. If so, it must then be determined whether  
22 the identification was nonetheless reliable.” *Id.* In determining the likelihood of  
23 misidentification, the following factors are considered:

1 the opportunity of the witness to view the criminal at the time of the crime, the  
2 witness' degree of attention, the accuracy of the witness' prior description of the  
3 criminal, the level of certainty demonstrated by the witness at the confrontation,  
4 and the length of time between the crime and the confrontation.

5 *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

6 Turning first to Garvin's identification of Davidson, Garvin was given a photo lineup  
7 following the attack, and while he was unable to identify Davidson initially, he picked Davidson  
8 out "[a]fter looking at the photos again." Ex. 76, ECF No. 13-15 at 3. Davidson appears to argue  
9 that Garvin's later identification of Davidson was tainted by "unnecessarily suggestive  
10 procedures." ECF No. 49 at 22. It is unclear why Garvin changed his mind about being able to  
11 identify his assailant after looking at the lineup again. However, to the extent that impermissibly  
12 suggestive procedures were used, I will assess whether Garvin's identification of Davidson was  
13 "nonetheless reliable." *Love*, 746 F.2d at 478.

14 Most of the *Biggers* factors indicate that Garvin's identifications of Davidson were  
15 reliable. First, although it was brief, Garvin had an opportunity to view the assailant at the time  
16 of the crime and to identify him as an individual he had met before. In his statement following  
17 the photo lineup, during the preliminary hearing, and during the trial, Garvin maintained that he  
18 believed the assailant was his neighbors' son. *See* Ex. 76, ECF No. 13-15 at 3; Ex. 3, ECF No.  
19 10-3 at 4-5; Ex. 27, ECF No. 11 at 27. Second, Garvin's degree of attention was appropriate: at  
20 trial, Garvin was able to describe his assailant's build, skin color, and approximate age. Ex. 27,  
21 ECF No. 11 at 27. Garvin was also able to describe what the assailant was wearing following the  
22 photo lineup: "a blue [and] white sports jersey." Ex. 76, ECF No. 13-15 at 3. Third, because his  
23 initial statement to the police was during the photo lineup, this factor—the accuracy of his prior  
descriptions of the assailant—is inapplicable. Fourth, the level of certainty given by Garvin at

1 the confrontation was somewhat weak in that Garvin was initially “unable to identify any of the  
2 pictures.” *Id.* Fifth, the length of time between the battery and the confrontation was brief; the  
3 photo lineup was conducted the following day. *See id.*

4 Although Garvin’s level of certainty during the photo lineup was somewhat lacking, he  
5 was consistent that the assailant was his neighbors’ son. Accordingly, after assessing the totality  
6 of the circumstances, I cannot conclude that Garvin’s identification violated Davidson’s right to  
7 due process. *See Manson*, 432 U.S. at 116 (“Surely, we cannot say that under all the  
8 circumstances of this case there is ‘a very substantial likelihood of irreparable  
9 misidentification.’” (citation omitted)). Importantly, Davidson’s trial counsel was able to cross-  
10 examine Garvin on any possible misidentification issues. Davidson’s trial counsel questioned  
11 Garvin about the fact that he could not identify the assailant during the 911 call, that Garvin had  
12 not seen his neighbors’ son up close, and that Garvin “definitely” knew that Davidson was the  
13 assailant only after “his mother brought the [apology] letter over.” Ex. 27, ECF No. 11 at 42-43,  
14 46. *See Simmons v. United States*, 390 U.S. 377, 384 (1968) (“The danger that use of the  
15 technique [of using photographs for initial identification] may result in convictions based on  
16 misidentification may be substantially lessened by a course of cross-examination at trial which  
17 exposes to the jury the method’s potential error.”); *see also Manson v. Brathwaite*, 432 U.S. 98,  
18 116 (1977) (“Juries are not so susceptible that they cannot measure intelligently the weight of  
19 identification testimony that has some questionable feature.”).

20 Turning next to Spencer’s identification of Davidson, Spencer did not pick Davidson  
21 from the photo lineup. Ex. 27, ECF No. 11 at 80, 111, 113. Instead, he identified Davidson at  
22 both the preliminary hearing and the trial. *See id.* at 99-100; Ex. 3, ECF No. 10-3 at 8, 10. “The  
23 due process check for reliability . . . comes into play *only* after the defendant establishes

1 improper police conduct.” *Perry v. New Hampshire*, 565 U.S. 228, 241 (2012) (emphasis added).  
2 Because Spencer did not pick Davidson from the photo lineup, there was no improper police  
3 conduct, so the reliability of Spencer’s identification of Davidson “falls within the province of  
4 the jury” and is simply tested “through the rights and opportunities generally designed for that  
5 purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination,  
6 protective rules of evidence, and jury instructions on both the fallibility of eyewitness  
7 identification and the requirement that guilt be proved beyond a reasonable doubt.” *Id.* at 232-33;  
8 *see also United States v. Domina*, 784 F.2d 1361, 1368 (9th Cir. 1986) (“When the initial  
9 identification is in court, . . . [t]he jury can observe the witness during the identification process  
10 and is able to evaluate the reliability of the initial identification.”). Because there is no  
11 requirement for a trial court to screen eyewitness evidence for reliability to evaluate whether a  
12 due process violation has occurred when “the identification was not procured under  
13 unnecessarily suggestive circumstances arranged by law enforcement,” *Perry*, 565 U.S. at 248,  
14 Davidson’s argument that his right to due process was violated by the state district court’s  
15 admission of Spencer’s identification lacks merit.

16 Because Garvin’s identification did not violate Davidson’s right to due process and  
17 Spencer’s identification did not implicate due process concerns, the Supreme Court of Nevada’s  
18 ruling was not contrary to, or an unreasonable application of, clearly established federal law as  
19 determined by the Supreme Court of the United State, and was not based on an unreasonable  
20 determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d). I will deny  
21 Davidson habeas corpus relief with respect to Ground 3.

22 ////

23 ////

1           **Ground 4**

2           In Ground 4, Davidson claims that his federal constitutional rights were violated when  
3 the state district court admitted his unreliable and involuntary confession, which was given after  
4 his rights were involuntarily waived. ECF No. 9 at 19, 21. Specifically, Davidson argues that he  
5 was noticeably sleepy, coming down from being on narcotics, was suffering from mental illness,  
6 and was in a drug-induced psychosis. *Id.* at 21. This ground was raised in Davidson’s direct  
7 appeal. Ex. 40, ECF No. 11-13 at 39. The Supreme Court of Nevada held that “Davidson’s  
8 confession was voluntary and the police did not violate his constitutional rights in obtaining the  
9 statement.” Ex. 44, ECF No. 12-3 at 4 n.1. As this ground was denied on the merits by the  
10 Supreme Court of Nevada without analysis, the question here is whether Davidson has shown  
11 that there was no reasonable basis for that ruling. *See Harrington*, 562 U.S. at 98.

12           Davidson moved to suppress his statements to the police. *See* Ex. 16, ECF No. 10-16.  
13 The motion included transcripts of his two interviews with detectives. *See id.* at 14-43. The first  
14 interview occurred on July 3, 2004, at 3:00 a.m. with Detective Kyle Toomer. *Id.* at 14. In the  
15 interview, Davidson stated that he read and understood his *Miranda* rights. *Id.* at 15. Davidson  
16 then explained that on June 28, 2004, he went to his parents’ neighbor’s house, knocked on the  
17 door, pushed the individual, “Mr. Bob,” down and “began aggressively attacking” him. *Id.* at 16-  
18 17. Davidson then explained that he took “Mr. Bob’s” car and left it “at some projects.” *Id.* at  
19 17. Davidson’s focus was on “[g]etting high.” *Id.* at 18. The second interview occurred the  
20 same night, July 3, 2004, at 4:50 a.m. with Detective Caldwell. *Id.* at 26. Davidson stated that he  
21 understood that his “Miranda rights still apply.” *Id.* at 27. He explained that he “was lookin’ for  
22 a place to lay [his] head so [he] came across this church.” *Id.* at 28. Davidson encountered an  
23 individual at the church, and Davidson pushed and punched him. *Id.* at 28, 30. Davidson then

1 took his wallet and keys. *Id.* at 31. During the second interview, Davidson stated that he did not  
2 even know what the current day was, that he was “twisted in [his] mind,” and that he used the  
3 money he stole to buy crack cocaine. *Id.* at 33, 36, 38.

4 Davidson’s motion also included two psychological reports from Greg Harder, Psy.D.  
5 *See id.* at 45-53. Dr. Harder evaluated Davidson on February 22, 2005, and September 7, 2005.  
6 *Id.* at 45, 50. Following his first evaluation, Dr. Harder concluded:

7 Mr. Davidson has a severe drug problem and is not functioning well at this time.  
8 His thoughts were disjointed and he was unable to answer all my questions  
9 without some assistance. However, he does understand his charges and potential  
10 consequences for those charges. He is also able to communicate in a rational  
11 manner, and should be able to assist counsel. My impression is that he is  
12 competent to stand trial, but is suffering from an amphetamine induced psychosis,  
13 or has brain damage from 23 years of exposure to meth. He described himself as  
14 in pain and needing to take drugs, and does not feel he can function without them.  
15 He is clearly impaired, but is not so impaired that he would be considered  
16 incompetent.

17 *Id.* at 47. Following his second evaluation, Dr. Harder recommended:

18 Mr. Davidson’s impaired mental states at the time of the criminal event and  
19 confession to the police should be considered in the defense of his case. While he  
20 clearly incriminated himself at the time of the interview, it seems unlikely that he  
21 had the mental capacity to make such statements rationally based on his mental  
22 confusion, inability to speak continuously, poor memory, and hallucinations at the  
23 time. It is highly questionable whether Mr. Davidson’s verbal statement was  
influenced by other parties. He was in the state of mind from an amphetamine  
induced psychosis where he could have been easily misled, or unable to provide  
details at all.

24 *Id.* at 52.

25 An evidentiary hearing was held on Davidson’s motion. *See* Ex. 22, ECF No. 10-22.  
26 Detective Kyle Toomer testified that he received a phone call from Davidson turning himself in  
27 to the police around 3:00 a.m. on July 3, 2004. *Id.* at 4, 5; *see also* Ex. 29, ECF No. 11-2 at 63,  
28 66-68 (testimony of Gwendolyn Davidson, Davidson’s mother, at trial in which she explained

1 that Davidson called her on July 3, 2004, that she initiated a three-way call with Davidson and  
2 Detective Toomer, and that during that phone call Davidson was talking very slow and did not  
3 sound like himself). Detective Toomer met Davidson at a bus station, put him in his vehicle, and  
4 took him to the police station. Ex. 22, ECF No. 10-22 at 6. Detective Toomer indicated that  
5 Davidson’s “appearance was normal for a person who calls at three in the morning and stated he  
6 was tired; tired, in fact, of running from us. But he appeared normal.” *Id.* Davidson was not  
7 slurring his speech, was articulate, and did not show any signs of being high or intoxicated. *Id.* at  
8 6, 9. During the drive to the police station, Davidson was voluntarily giving information and  
9 “telling his part.” *Id.* at 9. Davidson was read his *Miranda* rights once they arrived at the  
10 station.<sup>1</sup> *Id.* at 6-7.

11 Detective Stephen Caldwell testified that he interviewed Davidson after Davidson’s  
12 interview with Detective Toomer. *Id.* at 10, 11. Detective Caldwell’s interview took place at  
13

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14 <sup>1</sup> Detective Toomer’s testimony was similar at trial: he received a phone call from Davidson at  
15 3:00 a.m. on July 3, 2004, and Davidson “told [Detective Toomer] that he wanted to turn himself  
16 in.” Ex. 28, ECF No. 11-1 at 37, 43. Detective Toomer picked Davidson up, handcuffed him,  
17 and put him in his vehicle. *Id.* at 44. On the way to the police station, Davidson volunteered  
18 information, but Detective Toomer was not questioning him at that time. *Id.* at 45. Detective  
19 Toomer testified that Davidson “wasn’t too tired” and “appear[ed] normal” with no signs of  
20 being intoxicated. *Id.* at 48. Davidson had no issue understanding Detective Toomer’s questions.  
21 *Id.* at 49.

18 The only discrepancy between Detective Toomer’s testimony at the evidentiary hearing  
19 and the trial regarded the timing of the reading of Davidson’s *Miranda* rights. At the evidentiary  
20 hearing Detective Toomer testified that Davidson was read his *Miranda* rights “when [Detective  
21 Toomer] got him in the car.” Ex. 22, ECF No. 10-22 at 10. However, at trial, Detective Toomer  
22 testified that Davidson did not read him his *Miranda* right until they were in the interview room  
23 at the police station. Ex. 28, ECF No. 11-1 at 45-46.

21 Because Davidson’s statements made during the ride from the bus station to the police  
22 station were given voluntarily without questioning from Detective Toomer, *see Miranda v.*  
23 *Arizona*, 384 U.S. 436, 444 (1966) (explaining that there is no custodial interrogation without  
“questioning initiated by law enforcement officers”), it is immaterial to this analysis whether the  
reading of his *Miranda* rights occurred when Davidson was put in the vehicle at the bus station  
or after he arrived at the police station.

1 4:50 a.m. on July 3, 2004. *Id.* Davidson was not readvised of his *Miranda* rights. *Id.* Detective  
2 Caldwell described Davidson as being alert, answering the questions in a manner that made  
3 sense, and giving specific answers.<sup>2</sup> *Id.*

4 Dr. Greg Harder also testified at the evidentiary hearing. *Id.* at 13. After testifying about  
5 his evaluations of Davidson, the judge questioned Dr. Harder:

6 THE COURT: Okay. So how is that you think that when he can respond  
7 quickly, when he can respond without having to have  
8 anybody finish his sentences for him and when he provides  
9 details which, in fact, are accurate, that he is suffering from  
psychosis to the extent that he doesn't know what he's  
doing?

10 THE WITNESS: That's a hard question for me to answer.

11 THE COURT: I would think.

12 THE WITNESS: And, you know, I – I can't really know the answer to that.  
13 All I can say is that he does show some signs of psychosis  
14 and it's possible that his psychotic state waxes and wanes  
during the course of the illness.

15 THE COURT: But at the time of this second interview, which is the easy  
16 one to hear, he appeared pretty articulate and cogent, didn't  
he?

17 THE WITNESS: I believe so, yes.

18 THE COURT: And knew a lot of details, didn't he?

19 THE WITNESS: I believe so.

20 THE COURT: And if those details happened to be accurate and not known  
21 to anybody but the person, I mean, was there anything  
about that interview, other than this occasional statement,  
you know, I'm sorry, I'm twisted –

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22 <sup>2</sup> Detective Caldwell's testimony was similar at trial. *See* Ex. 29, ECF No. 11-2 at 51. He  
23 testified that Davidson did not appear to be intoxicated, that he seemed tired, and that "[h]e  
seemed to understand [the questions being asked] and was able to independently recall things."  
*Id.* at 59.



1 THE WITNESS: Right.

2 THE COURT: -- that would indicate that he didn't understand the  
3 questions, he didn't know what he was doing and he wasn't  
4 voluntarily telling the truth, anything about that?

5 THE WITNESS: I can't – I can't give any more information than that. I think  
6 you are right on that.

7 *Id.* at 17-18. Thereafter, the judge found that Davidson “knew what he was doing and he wasn’t  
8 under psychosis.” *Id.* at 19. The judge ruled Davidson’s statement to be voluntary and  
9 admissible. *Id.*

10 To the extent that Davidson argues that his waiver of rights was involuntary, a “defendant  
11 may waive effectuation of [his or her] rights, provided the waiver is made voluntarily,  
12 knowingly, and intelligently.” *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). There are two  
13 dimensions to determining whether a waiver of one’s constitutional privilege is coerced:

14 First, the relinquishment of the right must have been voluntary in the sense that it  
15 was the product of a free and deliberate choice rather than intimidation, coercion,  
16 or deception. Second, the waiver must have been made with a full awareness of  
17 both the nature of the right being abandoned and the consequences of the decision  
18 to abandon it. Only if the totality of the circumstances surrounding the  
19 interrogation reveal both an uncoerced choice and the requisite level of  
20 comprehension may a court properly conclude that the *Miranda* rights have been  
21 waived.

22 *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (internal quotation and citation omitted). During  
23 his interview with Detective Toomer, Davidson stated that he was read and understood his  
24 *Miranda* rights. Ex. 16, ECF No. 10-16 at 15; *see also* Ex. 22, ECF No. 10-22 at 6-7 (testimony  
25 of Detective Toomer that Davidson was read his *Miranda* rights once they arrived at the police  
26 station). Davidson also stated that he understood that his “*Miranda* rights still apply” at the  
27 beginning of his interview with Detective Caldwell. Ex. 16, ECF No. 10-16 at 27. There is no

1 evidence to suggest that Davidson's waiver of his rights was anything by voluntary, knowing,  
2 and intelligent.

3       Turning next to the confession, the admission into evidence at trial of an involuntary  
4 confession violates a defendant's right to due process under the Fourteenth Amendment. *Lego v.*  
5 *Twomey*, 404 U.S. 477, 478 (1972); *Brown v. Horell*, 644 F.3d 969, 979 (9th Cir. 2011); *see also*  
6 *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (explaining that the requirement that  
7 *Miranda* rights be given prior to a custodial interrogation does not dispense with a due process  
8 inquiry into the voluntariness of a confession). "A confession is involuntary if it is not 'the  
9 product of a rational intellect and a free will.'" *Brown*, 644 F.3d at 979 (quoting *Medeiros v.*  
10 *Shimoda*, 889 F.2d 819, 823 (9th Cir. 1989)). To determine whether a confession was  
11 involuntary, a court must consider the totality of the circumstances. *See Withrow v. Williams*,  
12 507 U.S. 680, 693 (1993); *Brown*, 644 F.3d at 979. The circumstances the court is to consider  
13 include: the element of police coercion; the length, location, and continuity of the interrogation;  
14 the defendant's maturity, education, physical condition, and mental health; whether the  
15 defendant was advised of his rights; and whether counsel was present. *See Withrow*, 507 U.S. at  
16 693-94.

17       First, there does not appear to be any coercion from the police here. In fact, Davidson  
18 wanted to turn himself in and contacted the police through his mother. *See* Ex. 22, ECF No. 10-  
19 22 at 5; Ex. 29, ECF No. 11-2 at 66-68. Second, the length and the location of the interrogations  
20 were not suspect. The interview with Detective Toomer lasted only 20 minutes, and the  
21 interview with Detective Caldwell lasted only 15 minutes. *See* Ex. 16, ECF No. 10-16 at 14-43.  
22 With regard to continuity, there was an hour and a half break between the first and second  
23 interview. *See id.* However, this break was due only to Detective Caldwell needing time to come

1 to the police station after learning that Davidson had turned himself in. Ex. 29, ECF No. 11-2 at  
2 55. Next, Davidson's age and education level were not concerning: he was 37 at the time of the  
3 crimes, and he graduated twelfth grade. Ex. 5, ECF No. 10-5 at 3. Further, although he did not  
4 have counsel present, Davidson was advised of his rights. *See Id.*

5 Davidson's argument that his confession was not voluntary centers primarily on his  
6 physical condition and mental health at the time of the interrogations. There was testimony that  
7 Davidson was tired. *See* Ex. 22, ECF No. 10-22 at 6. There was testimony from Davidson's  
8 mother that Davidson was talking very slowly and did not sound like himself the night of the  
9 interrogation. *See* Ex. 29, ECF No. 11-2 at 66-68. Finally, there was testimony by Dr. Harder  
10 that Davidson was suffering from an amphetamine-induced psychosis at the time of the  
11 interrogation. *See* Ex. 16, ECF No. 10-16 at 47, 52 (conclusion by Dr. Harder that "it seems  
12 unlikely that [Davidson] had the mental capacity to make such statements rationally based on his  
13 mental confusion").

14 On the other hand, Detective Toomer testified that Davidson appeared normal, was not  
15 slurring his speech, was articulate, and did not show any signs of being high or intoxicated. Ex.  
16 22, ECF No. 10-22 at 6, 9. Detective Caldwell also testified that Davidson was alert, answered  
17 questions in a manner that made sense, and gave specific answers. *Id.* at 11. Davidson was  
18 specific about the attacks against Garvin and Spencer. *See* Ex. 16, ECF No. 10-16 at 16-18, 28,  
19 30-31 (explaining how he knew Garvin, how he battered Garvin, what items he took from  
20 Garvin's residence, how he came upon Spencer, how he battered Spencer, and what items he  
21 took from Spencer). And importantly, the state district court, through its questions to Dr. Harder,  
22 pointed out that Davidson was articulate and cogent during the interrogations, that he knew a lot  
23 of details of the crimes, and that he was able to respond quickly. Ex. 22, ECF No. 10-22 at 17-

1 18. Based on the totality of the circumstances, especially a lack of sufficient evidence that  
2 Davidson's mental health was suffering at the time of the interrogation, I cannot determine that  
3 Davidson's confession was involuntary. *Withrow*, 507 U.S. at 693. Therefore, the Supreme  
4 Court of Nevada's ruling was not contrary to, or an unreasonable application of, clearly  
5 established federal law as determined by the Supreme Court of the United States, and was not  
6 based on an unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C. §  
7 2254(d). I will deny Davidson habeas corpus relief with respect to Ground 4.

#### 8 **Ground 5**

9 In Ground 5, Davidson claims that his federal constitutional rights were violated when  
10 the state district court refused to sever the two cases. ECF No. 9 at 22. Davidson explains that  
11 the two incidents were not part of a common plan or scheme, there was no factual nexus between  
12 the two incidents, one robbery would not be admissible as prior bad act evidence in the other  
13 robbery if the cases were severed, it would not be a burden to hear the cases separately as each  
14 trial would be short, and there is prejudice hearing the cases together. *Id.* The Respondents argue  
15 that the two incidents were sufficiently similar to establish a common scheme and permit cross-  
16 admissibility. ECF No. 44 at 12.

17 This ground was raised in Davidson's direct appeal. Ex. 40, ECF No. 11-13 at 42. The  
18 Supreme Court of Nevada held that "the district court did not abuse its discretion in refusing to  
19 sever Davidson's trial." Ex. 44, ECF No. 12-3 at 4 n.1. As this ground was denied on the merits  
20 by the Supreme Court of Nevada without analysis, the question here is whether Davidson has  
21 shown that there was no reasonable basis for that ruling. *See Harrington*, 562 U.S. at 98.

22 Davidson moved to sever counts five through eight, which involved the incident with  
23 Spencer, from counts one through four, which involved the incident with Garvin. *See* Ex. 15,

1 ECF No. 10-15. At the hearing on the motion, the state court judge denied severance after  
2 finding that “the letters connect these cases enough that—to have them together.” *Id.* at 3. *See*  
3 Ex. 21, ECF No. 10-21 at 2-4. Moreover, during the evidentiary hearing held on Davidson’s  
4 motion to suppress, the judge indicated again that the motion to sever was denied because the  
5 apology letters are cross-admissible and tied the two incidents together. Ex. 22, ECF No. 10-22  
6 at 19-20.

7 “Improper joinder does not, in itself, violate the Constitution. Rather, misjoinder would  
8 rise to the level of a constitutional violation only if it results in prejudice so great as to deny a  
9 defendant his Fifth Amendment right to a fair trial.” *United States v. Lane*, 474 US 438, 466 n.8  
10 (1986). Therefore, to prevail, Davidson “bears the burden of demonstrating that the state court’s  
11 denial of his severance motion rendered his trial ‘fundamentally unfair.’” *Grisby v. Blodgett*, 130  
12 F.3d 365, 370 (9th Cir. 1997). Davidson has not established that his trial was fundamentally  
13 unfair by joinder of the charges regarding Garvin and the charges regarding Spencer. Rather, the  
14 two incidents have numerous similarities: Davidson approached both victims innocuously,  
15 battered both victims, stole Garvin’s money and Spencer’s wallet, and then stole both victims’  
16 vehicles. Ex. 3, ECF No. 10-3 at 4-5, 18-19; Ex. 16, ECF No. 10-16 at 16-17, 28, 30-31; Ex. 27,  
17 ECF No. 11 at 85, 88, 90, 93.

18 Moreover, the Ninth Circuit has held that the above-mentioned footnote in *Lane* is dicta  
19 and does not set forth clearly established law binding on the states on federal habeas review. *See*  
20 *Runnigeagle v. Ryan*, 686 F.3d 758, 776-77 (9th Cir. 2012) (“*Lane* do[es] not ‘establish a  
21 constitutional standard binding on the states.’” (citing *Collins v. Runnels*, 603 F.3d 1127, 1131  
22 (9th Cir. 2010))). Due to the controlling Ninth Circuit authority, the Supreme Court of Nevada’s  
23 ruling was not contrary to, or an unreasonable application of, clearly established federal law as

1 determined by the Supreme Court of the United States, and was not based on an unreasonable  
2 determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d). I will deny  
3 Davidson habeas corpus relief with respect to Ground 5.<sup>3</sup>

4 **Ground 7**

5 In Ground 7, Davidson claims that his federal constitutional rights were violated when his  
6 trial date was delayed. ECF No. 9 at 23. The Respondents argue that the delay was not  
7 uncommonly long, that various reasons contributed to the delay, and that Davidson fails to show  
8 prejudice. ECF No. 44 at 13. This ground was raised in Davidson’s direct appeal. Ex. 40, ECF  
9 No. 11-13 at 55. The Supreme Court of Nevada held that “Davidson’s right to a speedy trial was  
10 not violated.” Ex. 44, ECF No. 12-3 at 4 n.1. As this ground was denied on the merits by the  
11 Supreme Court of Nevada without analysis, the question here is whether Davidson has shown  
12 that there was no reasonable basis for that ruling. *See Harrington*, 562 U.S. at 98.

13 Although the right to a speedy trial is “one of the most basic rights preserved by our  
14 Constitution,” *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967), there is no fixed measure to  
15 determine when the right has been violated. Rather, “any inquiry into a speedy trial claim  
16 necessitates a functional analysis of the right in the particular context of the case.” *Barker v.*  
17 *Wingo*, 407 U.S. 514, 522 (1972); *see also Beavers v. Haubert*, 198 U.S. 77, 87 (1905) (“The  
18 right of a speedy trial is necessarily relative. It is consistent with delays and depends upon  
19 circumstances.”). In determining whether a defendant’s right to a speedy trial has been violated,  
20 a balancing test is used, “in which the conduct of both the prosecution and the defendant are  
21 weighed.” *Barker*, 407 U.S. at 530. The primary factors to be considered in this balancing test  
22 are the “[l]ength of [the] delay, the reasons for the delay, the defendant’s assertion of his right,  
23

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<sup>3</sup> Ground 6 was dismissed from this action. ECF No. 37.

1 and prejudice to the defendant.” *Id.* The first factor, “[t]he length of the delay[,] is to some  
2 extent a triggering mechanism. Until there is some delay which is presumptively prejudicial,  
3 there is no necessity for inquiry into the other factors that go into the balance.” *Id.*

4 The delay in this case was two years, one month, and eight days, from July 6, 2004, when  
5 the original criminal complaint was filed (*see* Ex. 2, ECF No. 10-2) to August 14, 2006, when  
6 Davidson’s trial commenced (*see* Ex. 26, ECF No. 10-26). This is enough delay to bring the  
7 other *Barker* factors into play. *See Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992)  
8 (holding that delays approaching one year are presumptively prejudicial); *see also United States*  
9 *v. Beamon*, 992 F.2d 1009, 1014 (9th Cir. 1993) (noting that the 17-month and 20-month delays  
10 in that case were only five to eight months longer than the one-year benchmark that triggers the  
11 speedy trial inquiry under *Barker*); *United States v. Vassell*, 970 F.2d 1162, 1164 (2d Cir. 1992)  
12 (finding a general consensus that around eight months is presumptively prejudicial).

13 Davidson was arraigned on August 23, 2004. Ex. 5, ECF No. 10-5. At that time, he  
14 invoked his right to a speedy trial, and his trial was scheduled for October 18, 2004. *Id.* On  
15 October 12, 2004, Davidson’s counsel requested a continuance, and the trial was reset for  
16 December 13, 2004. Ex. 1, ECF. No. 10-1 at 5. On December 7, 2004, Davidson’s counsel  
17 advised that he was not prepared, and the trial was reset for February 22, 2005. *Id.* at 7. On  
18 February 10, 2005, an amended information was filed, the state district court granted Davidson’s  
19 motion for a psychological evaluation and the State’s motion to compel a handwriting sample,  
20 and the trial date was vacated. *Id.* at 10. On March 2, 2005, Davidson’s counsel indicated that  
21 Davidson was “contemplating hiring private counsel.” *Id.* at 15. On March 10, 2005, Davidson’s  
22 counsel indicated that Davidson could not afford to hire private counsel, so the trial was reset for  
23 May 23, 2005. *Id.* at 17. On May 17, 2005, Davidson’s counsel indicated that “both sides have

1 agreed to a continuance,” and the trial was reset for October 10, 2005. *Id.* at 18. On October 4,  
2 2005, the trial was reset for February 21, 2006, “[a]t the request of [c]ounsel” due, in part, to the  
3 briefing on Davidson’s motion to suppress not being completed. *Id.* at 23. On December 12,  
4 2005, the state district court held an evidentiary hearing on Davidson’s motion to suppress and  
5 motion to compel psychiatric examination. *Id.* at 30. On February 14, 2006, Davidson’s counsel  
6 “stated there was a scheduling conflict,” and the trial date was vacated. *Id.* at 37. On March 8,  
7 2006, the trial was reset for June 19, 2006. *Id.* at 42. On April 21, 2006, the state district court  
8 held an evidentiary hearing on Davidson’s motion to suppress. *Id.* at 44. On June 15, 2006, the  
9 trial was reset for August 14, 2006, “[f]ollowing statements by [c]ounsel and the State.” *Id.* at 47.

10 Although the length of the delay was extensive and Davidson did invoke his right to a  
11 speedy trial, those two factors alone do not compel a finding that Davidson was deprived of his  
12 right to speedy trial. Rather, the reasons for the delay point to an opposite finding: there was no  
13 “deliberate attempt[s] to delay the trial in order to hamper the defense,” but instead it appears  
14 that Davidson’s trial was continued at Davidson’s counsel’s request or for valid reasons which  
15 “serve to justify appropriate delay.” *Barker*, 407 U.S. at 531. Davidson argues that he was  
16 prejudiced by the delay because it allowed the State more time to collect his inmate  
17 request/grievance forms. ECF No. 9 at 24. But prejudice “should be assessed in the light of the  
18 interests of defendants which the speedy trial right was designed to protect.” *Barker*, 407 U.S. at  
19 532. Those interests include “(i) to prevent oppressive pretrial incarceration; (ii) to minimize  
20 anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be  
21 impaired.” *Id.* Davidson fails to demonstrate that any of these interests was impacted. After  
22 weighing the factors, I cannot determine that Davidson was deprived of his right to a speedy  
23 trial. The Supreme Court of Nevada’s ruling was not contrary to, or an unreasonable application



1 of, clearly established federal law as determined by the Supreme Court of the United States, and  
2 was not based on an unreasonable determination of the facts in light of the evidence. *See* 28  
3 U.S.C. § 2254(d). I will deny Davidson habeas corpus relief with respect to Ground 7.

4 **Ground 8A**

5 In Ground 8A, Davidson claims that his federal constitutional rights were violated when  
6 his trial counsel failed to object to the admission of the inmate request/grievance forms. ECF No.  
7 9 at 25. Davidson explains that there was no strategic justification for failing to object: his trial  
8 counsel made it clear that he did not contest that Davidson wrote the apology letters, so his trial  
9 counsel should have just conceded authorship and negated the need for the forms. *Id.* at 27. This  
10 ground was raised in Davidson’s state habeas appeal. Ex. 59, ECF No. 12-18 at 14. The  
11 Supreme Court of Nevada held as follows:

12 Appellant failed to demonstrate prejudice. The inmate request/grievance forms  
13 were introduced into evidence for the purpose of comparing appellant’s  
14 handwriting to the handwriting of apology letters sent to the victims, as appellant  
15 was unwilling to provide a natural handwriting sample. While counsel’s failure to  
16 redact the forms may constitute deficient performance, appellant could not  
17 demonstrate that he was prejudiced in light of the overwhelming evidence of  
guilt. One of the victims positively identified appellant, who was his neighbor,  
and the other victim and a witness gave descriptions that matched him closely.  
Appellant confessed to the police that he committed the crimes, and he wrote  
letters of apology to the victims. Therefore, given this overwhelming evidence,  
we conclude that the district court did not err in denying this claim.

18 Ex. 62, ECF No. 13-1 at 3. The ruling of the Supreme Court of Nevada was reasonable.

19 In *Strickland v. Washington*, the Supreme Court of the United States propounded a two-  
20 prong test for analysis of claims of ineffective assistance of counsel requiring, the petitioner to  
21 demonstrate (1) that the attorney’s “representation fell below an objective standard of  
22 reasonableness,” and (2) that the attorney’s deficient performance prejudiced the defendant such  
23 that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of

1 the proceeding would have been different.” 466 U.S. 668, 688, 694 (1984). A court considering  
2 a claim of ineffective assistance of counsel must apply a “strong presumption that counsel’s  
3 conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689. The  
4 petitioner’s burden is to show “that counsel made errors so serious that counsel was not  
5 functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687.  
6 And, to establish prejudice under *Strickland*, it is not enough for the habeas petitioner “to show  
7 that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693.  
8 Rather, the errors must be “so serious as to deprive the defendant of a fair trial, a trial whose  
9 result is reliable.” *Id.* at 687.

10 Where a state district court previously adjudicated the claim of ineffective assistance of  
11 counsel under *Strickland*, establishing that the decision was unreasonable is especially difficult.  
12 See *Harrington*, 562 U.S. at 104-05. In *Harrington*, the Supreme Court instructed:

13 Establishing that a state court’s application of *Strickland* was unreasonable under  
14 § 2254(d) is all the more difficult. The standards created by *Strickland* and  
15 § 2254(d) are both “highly deferential,” [*Strickland*, 466 U.S. at 689]; *Lindh v.*  
16 *Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and  
17 when the two apply in tandem, review is “doubly” so, *Knowles v. Mirzayance*,  
18 556 U.S. 111, 123 (2009)]. The *Strickland* standard is a general one, so the range  
19 of reasonable applications is substantial. 556 U.S., at 123, 129 S.Ct. at 1420.  
Federal habeas courts must guard against the danger of equating unreasonableness  
under *Strickland* with unreasonableness under § 2254(d). When § 2254(d)  
applies, the question is not whether counsel’s actions were reasonable. The  
question is whether there is any reasonably argument that counsel satisfied  
*Strickland*’s deferential standard.

20 *Harrington*, 562 U.S. at 105; see also *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010)  
21 (“When a federal court reviews a state court’s *Strickland* determination under AEDPA, both  
22 AEDPA and *Strickland*’s deferential standards apply; hence, the Supreme Court’s description of  
23 the standard as ‘doubly deferential.’”).

1 In analyzing a claim of ineffective assistance of counsel under *Strickland*, a court may  
2 first consider either the question of deficient performance or the question of prejudice; if the  
3 petitioner fails to satisfy one element of the claim, the court need not consider the other. *See*  
4 *Strickland*, 466 U.S. at 697.

5 I held in Ground 1 that the inmate request/grievance forms were admitted for the  
6 permissible purpose of showing the basis of the handwriting analysis expert's opinion that  
7 Davidson wrote the two apology letters. Therefore, it was not deficient performance for  
8 Davidson's trial counsel to not have objected to the forms. *See Morris v. California*, 966 F.2d  
9 448, 456 (9th Cir. 1991) ("We need not determine the actual explanation for trial counsel's  
10 failure to object, so long as his failure to do so falls within the range of reasonable  
11 representation."). However, because the forms contained information concerning Davidson's  
12 desire to be in addiction and violence prevention classes, along with information that Davidson  
13 was subdued after a fight in the jail and the implied fact that Davidson had been incarcerated  
14 previously, *see* Ex. 81, ECF No. 13-20 at 3-6, 8-29, 30-51, 53, it would have been reasonable for  
15 Davidson's counsel to have sought redaction of the forms.

16 Although Davidson's trial counsel's failure to request redaction of the forms may amount  
17 to "representation [that] fell below an objective standard of reasonableness," Davidson must also  
18 demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors,  
19 the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.  
20 Davidson fails to meet this burden. As the Supreme Court of Nevada stated, there was  
21 overwhelming evidence of guilt presented at Davidson's trial. *See* Ex. 62, ECF No. 13-1 at 3.  
22 Not only did Davidson confess to the crimes (*see* Ex. 16, ECF No. 10-16 at 14-43), but his trial  
23 counsel conceded during closing argument that Davidson wrote apology letters to the victims.

1 Ex. 30, ECF No. 11-3 at 16, 20 (“We’ve never contested that Roderick wrote these letters. If  
2 you remember, I didn’t have any questions for the handwriting expert about the letters  
3 themselves.”). And without a showing that the jury even considered the undesirable information  
4 in the forms, Davidson cannot demonstrate that the result of his trial would have been different  
5 with the redaction. *See* Ex. 29, ECF No. 11-2 at 11-14, 37-49 (demonstrating that when the State  
6 introduced the forms and admitted them into evidence, it did not touch upon the contents of the  
7 forms; rather, it only discussed the handwriting on the forms). As Davidson fails to demonstrate  
8 prejudice, the Supreme Court of Nevada’s ruling was not contrary to, or an unreasonable  
9 application of, clearly established federal law as determined by the Supreme Court of the United  
10 States, and was not based on an unreasonable determination of the facts in light of the evidence.  
11 *See* 28 U.S.C. § 2254(d). I will deny Davidson habeas corpus relief with respect to Ground 8A.

12 **Grounds 8B and 9A**

13 In Ground 8B, Davidson claims that his federal constitutional rights were violated when  
14 his trial counsel failed to object to a flight instruction. ECF No. 9 at 28. Davidson explains that  
15 he did not run to another jurisdiction or attempt to flee in any way other than necessary to  
16 accomplish the crime itself. *Id.* In Ground 9A, Davidson claims his federal constitutional rights  
17 were violated when his appellate counsel failed to include a ground in his direct appeal  
18 concerning the alleged improper flight instruction. *Id.* at 30. These grounds were raised in  
19 Davidson’s state habeas appeal. Ex. 59, ECF No. 12-18 at 19. With regard to Davidson’s trial  
20 counsel’s alleged deficient performance, the Supreme Court of Nevada held as follows:

21 Appellant failed to demonstrate that trial counsel’s performance was deficient or  
22 that he was prejudiced. A witness testified that she saw someone who looked like  
23 appellant leave the victim’s house in the victim’s car at the time the victim was  
attacked and robbed. Thus, the flight instruction was supported by evidence, and  
counsel was not deficient for failing to object to the instruction. *See Weber v.*  
*State*, 121 Nev. 554, 581-82, 119 P.3d 107, 126 (2005). Moreover, in light of the

1 overwhelming evidence against him appellant failed to demonstrate prejudice.  
2 Therefore, the district court did not err in denying this claim.

3 Ex. 62, ECF No. 13-1 at 3. With regard to Davidson’s appellate counsel’s alleged deficient  
4 performance, the Supreme Court of Nevada held that Davidson “failed to demonstrate that  
5 counsel’s performance was deficient or that he was prejudiced.” *Id.* at 4-5. These rulings of the  
6 Supreme Court of Nevada were reasonable.

7 The flight instruction in question provided:

8 The flight of a person immediately after the commission of a crime, or after he is  
9 accused of a crime, is not sufficient in itself to establish his guilt, but is a fact  
10 which, if proved, may be considered by you in light of all other proved facts in  
11 deciding the question of his guilt or innocence. Whether or not evidence of flight  
12 shows a consciousness of guilt and the significance to be attached to such a  
13 circumstance are matters for your deliberation.

14 Ex. 34, ECF No. at 11-7 at 23.

15 Garvin testified that Davidson “took the money and the keys and took my car and drove  
16 away.” Ex. 27, ECF No. 11 at 19. Similarly, Spencer testified that after Davidson battered him,  
17 Davidson “walked out and pulled the door shut behind him” and “left in my truck.” *Id.* at 93.  
18 Importantly, during his confession, Davidson also states that he fled after the two attacks. *See*  
19 Ex. 16, ECF No. 10-16 at 17 (statement of Davidson explaining that he took Garvin’s keys,  
20 drove Garvin’s car away from the scene, and then left the car at some projects), at 31 (statement  
21 of Davidson explaining that he drove Spencer’s truck away from the scene). Thus, there is  
22 evidence that Davidson fled with consciousness of guilt and to evade arrest. *See Walker v. State*,  
23 113 Nev. 853, 870-71, 944 P.2d 762, 773 (1997). It is apparent that Davidson left the crime  
scenes in the quickest way possible—using the victims’ vehicles—to avoid the police being  
called and arresting him. Accordingly, there was evidence presented at Davidson’s trial

1 warranting the flight instruction under Nevada caselaw, so Davidson’s trial counsel was not  
2 deficient in failing to object to the instruction. *See Potter v. State*, 96 Nev. 875, 875-76, 619 P.2d  
3 1222, 1222 (1980) (“The giving of [a flight] instruction is not error if evidence of flight has been  
4 admitted.”); *see also Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002) (“Instructional error will  
5 not support a petition for federal habeas corpus relief unless it is shown ‘not merely that the  
6 instruction is undesirable, erroneous, or even universally condemned,’ but that by itself the  
7 instruction ‘so infected the entire trial that the resulting conviction violates due process.’”  
8 (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973))).

9       Even if Davidson’s trial counsel’s failure to object to the instruction amounted to a  
10 deficient performance, Davidson must also demonstrate that “there is a reasonable probability  
11 that, but for counsel’s unprofessional errors, the result of the proceeding would have been  
12 different.” *Strickland*, 466 U.S. at 694. The instruction specifically cautioned the jury not to  
13 infer Davidson’s guilt from flight alone. *See* Ex. 34, ECF No. at 11-7 at 23 (“[F]light . . . is not  
14 sufficient in itself to establish his guilt.”). Therefore, the jury necessarily had to rely on other  
15 evidence in order to find Davidson guilty, so Davidson fails to demonstrate that absent the flight  
16 instruction, the result of his trial would have been different.

17       I turn briefly to Davidson’s argument that his appellate counsel failed to include a ground  
18 in his direct appeal regarding the flight instruction. Davidson “must first show that his counsel  
19 was objectively unreasonable . . . in failing to find arguable issues on appeal—that is, that  
20 counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising  
21 them.” *Smith v. Robbins*, 528 U.S. 259, 285 (2000). If Davidson is successful in meeting that  
22 burden, “he then has the burden of demonstrating prejudice. That is, he must show a reasonable  
23 probability that, but for counsel’s unreasonable failure to file a merits brief, he would have

1 prevailed on his appeal.” *Id.* Because evidence was presented at Davidson’s trial warranting the  
2 flight instruction, I cannot determine that Davidson’s appellate counsel was objectively  
3 unreasonable in not including this ground in Davidson’s direct appeal. In fact, Davidson’s  
4 appellate counsel was successful in reversing a portion of Davidson’s judgment. *See* Ex. 44, ECF  
5 No. 12-3 (the Supreme Court of Nevada’s holding that one count of robbery was a double-  
6 jeopardy violation and one count of battery should be a misdemeanor, not a felony). So it was  
7 reasonable for Davidson’s appellate counsel to have left out this frivolous argument in order to  
8 highlight better ones. *See Jones v. Barnes*, 463 U.S. 745, 753 (1983) (“A brief that raises every  
9 colorable issue runs the risk of burying good arguments.”).

10 Because Davidson’s trial counsel’s actions in not objecting to the flight instruction and  
11 his appellate counsel’s actions in not including a ground regarding the flight instruction in his  
12 direct appeal did not “f[a]ll below an objective standard of reasonableness,” *Strickland*, 466 U.S.  
13 at 688, the Supreme Court of Nevada’s rulings were not contrary to, or an unreasonable  
14 application of, clearly established federal law as determined by the Supreme Court of the United  
15 States, and were not based on an unreasonable determination of the facts in light of the evidence.  
16 *See* 28 U.S.C. § 2254(d). I will deny Davidson habeas corpus relief with respect to Grounds 8B  
17 and 9A.<sup>4</sup>

#### 18 **Grounds 8C and 9B**

19 In Ground 8C, Davidson claims that his federal constitutional rights were violated when  
20 his trial counsel failed to object when the State vouched for the credibility of two witnesses. ECF

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21  
22 <sup>4</sup>Davidson also argues that the flight instruction framed the question for the jury to decide guilt  
23 or innocence, but it should have been reasonable doubt as to guilt. ECF No. 9 at 28. This  
argument lacks merit. This same instruction was evaluated in *Karis v. Calderon*, and it was  
found not to have violated due process. 283 F.3d 1117, 1131-32 (9th Cir. 2002).

1 No. 9 at 28. The Respondents argue that the prosecutor was merely making fair comments about  
2 the state of the evidence presented at trial. ECF No. 44 at 16. In Ground 9B, Davidson claims  
3 that his federal constitutional rights were violated when his appellate counsel failed to include a  
4 ground concerning improper vouching in his direct appeal. ECF No. 9 at 31.

5       These grounds were raised in Davidson’s state habeas appeal. Ex. 59, ECF No. 12-18 at  
6 20. With regard to Davidson’s trial counsel’s alleged deficient performance, the Supreme Court  
7 of Nevada held:

8       Appellant failed to demonstrate that his trial counsel’s performance was deficient  
9 because the prosecutor did not improperly vouch for the credibility of the  
10 witnesses. *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004)  
11 (recognizing that the prosecutor improperly vouches for a witness when the  
12 prosecutor “places the prestige of the government behind the witness” (internal  
quotations omitted)). Further, appellant failed to demonstrate that there was a  
reasonable probability of a different outcome at trial given the overwhelming  
evidence of guilt. Therefore, we conclude that the district court did not err in  
denying this claim.

13 Ex. 62, ECF No. 13-1 at 4. With regard to Davidson’s appellate counsel’s alleged deficient  
14 performance, the Supreme Court of Nevada held that Davidson “failed to demonstrate that  
15 counsel’s performance was deficient or that he was prejudiced.” *Id.* at 4-5. These rulings were  
16 reasonable.

17       During its closing argument, the State argued that “Ms. Stowe was totally honest with  
18 you and told you: [l]ook, I didn’t see his face, but I thought it was [Davidson].” Ex. 30, ECF No.  
19 11-3 at 6, 23-24. The State also argued that “[Spencer] told you, and you saw him on the stand,  
20 and he was credible.” *Id.* at 24.

21       “Vouching consists of placing the prestige of the government behind a witness through  
22 personal assurances of the witness’s veracity, or suggesting that information not presented to the  
23 jury supports the witness’s testimony.” *United States v. Necochea*, 986 F.2d 1273, 1276 (9th



1 Cir. 1993); *see also United States v. Young*, 470 U.S. 1, 8-9 (explaining that the prosecutor “must  
2 refrain from injecting personal beliefs into the presentation of [the] case”). Several factors are  
3 assessed in determining whether improper vouching occurred:

4 the form of vouching; how much the vouching implies that the prosecutor has  
5 extra-record knowledge of or the capacity to monitor the witness’s truthfulness;  
6 any inference that the court is monitoring the witness’s veracity; the degree of  
7 personal opinion asserted; the timing of the vouching; the extent to which the  
witness’s credibility was attacked; the specificity and timing of a curative  
instruction; the importance of the witness’s testimony and the vouching to the  
case overall.

8 *Necoechea*, 986 F.2d at 1278.

9 The extent of the State’s comments about Stowe and Spencer were minimal. *See United*  
10 *States v. Younger*, 398 F.3d 1179, 1190 (9th Cir. 2005) (holding that a single improper statement  
11 did not materially affect the verdict). The State merely commented that Stowe was “honest,” and  
12 Spencer was “credible.” Ex. 30, ECF No. 11-3 at 6, 23-24. Accordingly, the degree of vouching  
13 was nominal, such that the statements did not rise to the level of improper vouching.

14 Because there was no improper vouching, Davidson’s trial counsel’s actions in not  
15 objecting to the comments and his appellate counsel’s actions in not including a ground of  
16 improper vouching on appeal did not “f[a]ll below an objective standard of reasonableness.”  
17 *Strickland*, 466 U.S. at 688. Therefore, the Supreme Court of Nevada’s rulings were not  
18 contrary to, or an unreasonable application of, clearly established federal law as determined by  
19 the Supreme Court of the United States, and were not based on an unreasonable determination of  
20 the facts in light of the evidence. *See* 28 U.S.C. § 2254(d). I will deny Davidson habeas corpus  
21 relief with respect to Grounds 8C and 9B.

22 **Grounds 8D and 9C**  
23

1 In Ground 8D, Davidson claims that his federal constitutional rights were violated when  
2 his trial counsel failed to object to the reasonable doubt instruction. ECF No. 9 at 29. Davidson  
3 contends the instruction minimized the State's burden of proof, as it inflated the constitutional  
4 standard of doubt necessary for acquittal. *Id.* In Ground 9C, Davidson claims his federal  
5 constitutional rights were violated when his appellate counsel failed to include a ground  
6 concerning the reasonable doubt instruction in his direct appeal. *Id.* at 31. The Respondents  
7 argue that the state district court gave the instruction that is required by statute, which  
8 demonstrates that a challenge to the reasonable doubt instruction would have failed on appeal.  
9 ECF No. 44 at 19.

10 These grounds were raised in Davidson's state habeas appeal. Ex. 59, ECF No. 12-18 at  
11 21. With regard to Davidson's trial counsel's alleged deficient performance, the Supreme Court  
12 of Nevada held that "[a]ppellant failed to demonstrate that counsel's performance was deficient  
13 or that he was prejudiced, as he received the instruction required by NRS 175.211. Thus, we  
14 conclude that the district court did not err in denying this claim." Ex. 62, ECF No. 13-1 at 4.  
15 With regard to Davidson's appellate counsel's alleged deficient performance, the Supreme Court  
16 of Nevada held that Davidson "failed to demonstrate that counsel's performance was deficient or  
17 that he was prejudiced." *Id.* at 4-5. I find that these rulings were reasonable.

18 The reasonable doubt instruction stated:

19 The Defendant is presumed innocent until the contrary is proved. This  
20 presumption places upon the State the burden of proving beyond a reasonable  
21 doubt every material element of the crime charged and that the Defendant is the  
22 person who committed the offense.

23 A reasonable doubt is one based on reason. It is not mere possible doubt  
but is such a doubt as would govern or control a person in the more weighty  
affairs of life. If the minds of the jurors, after the entire comparison and  
consideration of all the evidence, are in such a condition that they can say they

1 feel an abiding conviction of the truth of the charge, there is not a reasonable  
2 doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

3 If you have a reasonable doubt as to the guilt of the Defendant, he is  
4 entitled to a verdict of not guilty.  
5 Ex. 34, ECF No. 11-7 at 21.

6 This reasonable doubt jury instruction was nearly identical<sup>5</sup> to the reasonable doubt  
7 instruction analyzed in *Ramirez v. Hatcher*, 136 F.3d 1209, 1210-11 (9th Cir. 1998). And in  
8 *Ramirez*, the instruction was found to not “unconstitutionally misstate the concept of reasonable  
9 doubt.” *Id.* at 1214. Because the jury instruction was proper, Davidson’s trial counsel’s actions  
10 in not objecting to the instruction and his appellate counsel’s actions in not including a ground  
11 regarding the jury instruction on appeal did not “f[a]ll below an objective standard of  
12 reasonableness.” *Strickland*, 466 U.S. at 688. Therefore, the Supreme Court of Nevada’s rulings  
13 were not contrary to, or an unreasonable application of, clearly established federal law as  
14 determined by the Supreme Court of the United States, and were not based on an unreasonable  
15 determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d). I will deny  
16 Davidson habeas corpus relief with respect to Grounds 8D and 9C.

### 17 **Ground 8E**

18 In Ground 8E, Davidson claims that the cumulative effect of his trial counsel’s errors  
19 prejudiced him and violated his federal rights. ECF No. 9 at 29. This ground was raised in

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20 <sup>5</sup>The only difference between the reasonable doubt instruction provided in Davidson’s trial and  
21 the reasonable doubt instruction provided in *Ramirez* was the omission of the word “substantial.”  
22 *Compare* Ex. 34, ECF No. 11-7 at 21 (“Doubt to be reasonable must be actual, not mere  
23 possibility or speculation. . . .”), *with Ramirez v. Hatcher*, 136 F.3d 1209, 1210-11 (9th Cir.  
1998) (“Doubt to be reasonable must be actual *and substantial*, not mere possibility or  
speculation. . . .”) (emphasis added). However, because “the use of the term ‘substantial’ to  
describe reasonable doubt has been disfavored,” *Ramirez*, 136 F.3d at 1212, the reasonable doubt  
instruction provided in Davidson’s trial was even more acceptable than the reasonable doubt  
instruction in *Ramirez*.

Davidson’s state habeas appeal. Ex. 59, ECF No. 12-18 at 22. The Supreme Court of Nevada held that Davidson “has not demonstrated prejudice resulting from the cumulative effect of any deficiencies in counsel’s representation.” Ex. 62, ECF No. 13-1 at 5. The only possible error committed by Davidson’s trial counsel was not moving to redact certain portions of the inmate request/grievance forms. However, because there were no other errors to accumulate, the Supreme Court of Nevada’s ruling was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, and was not based on an unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d). I will deny Davidson habeas corpus relief with respect to Ground 8E.

**Ground 9D**

In Ground 9D, Davidson claims that the cumulative effect of his appellate counsel’s errors prejudiced him and violated his federal rights. ECF No. 9 at 32. This ground was raised in Davidson’s state habeas appeal. Ex. 59, ECF No. 12-18 at 22. The Supreme Court of Nevada held that Davidson “has not demonstrated prejudice resulting from the cumulative effect of any deficiencies in counsel’s representation.” Ex. 62, ECF No. 13-1 at 5. Davidson has failed to demonstrate any errors on the part of his appellate counsel. Therefore, because there are no errors to consider cumulatively, the Supreme Court of Nevada’s ruling was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, and was not based on an unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d). I will deny Davidson habeas corpus relief with respect to Ground 9D.

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1 **Certificate of Appealability**

2       The issuance of a certificate of appealability requires a “substantial showing of the denial  
3 of a constitutional right.” 28 U.S.C. § 2253(c). “Where a district court has rejected the  
4 constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward:  
5 The petitioner must demonstrate that reasonable jurists would find the district court’s assessment  
6 of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000);  
7 *see also James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir. 2000). A certificate of appealability is  
8 unwarranted in this case.

9 **CONCLUSION**

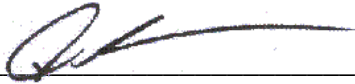
10       It is therefore ordered that the First Amended Petition for Writ of Habeas Corpus by a  
11 Person in State Custody Pursuant to 28 U.S.C. § 2254 **(ECF No. 9) is denied.**

12       It is further ordered that the Petitioner is denied a certificate of appealability.

13       It is further ordered that, pursuant to Federal Rule of Civil Procedure 25(d), the Clerk of  
14 Court is directed to substitute Jerry Howell for Dwight Neven as the Respondent warden on the  
15 docket for his case.

16       It is further ordered that the Clerk of the Court is directed to enter judgment accordingly.

17       Dated: September 11, 2019.

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21 ANDREW P. GORDON  
22 UNITED STATES DISTRICT JUDGE  
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